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In the Supreme Court of the United States

No. 693.

OCTOBER TERM, 1955.

WILLIAM J. KRAUS,
A Taxpayer on Behalf of the City of Cleveland,
Appellant,

vs.

CITY OF CLEVELAND, *et al.*,
Appellees.

APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE BY THE CHRISTIAN SCIENCE BOARD OF DIRECTORS AND BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT.

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APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE BY THE CHRISTIAN SCIENCE BOARD OF DIRECTORS IN SUPPORT OF THE JURISDICTIONAL STATEMENT.

The Christian Science Board of Directors on behalf of The Mother Church, The First Church of Christ, Scientist, in Boston, Massachusetts, its 16 branch churches in Greater Cleveland and its 2364 other branch churches throughout the United States respectfully moves the Court for leave to file a brief *amicus curiae* in support of the Jurisdictional Statement in this case. The consent of the appellant, William J. Kraus, appearing *in propria persona,* has been obtained. The consent of the appellees, City of Cleveland, et al., has been requested and refused.

The interest of The Christian Science Board of Directors in this litigation arises from the fact that there is here presented the question of the right of a municipality to

place medicinal additives in its municipal water supply for the purpose of ameliorating or preventing tooth decay in children. The benefits of such medication are questioned by eminent medical authorities but applicant does not concern itself with the merits of such questions. The religion of Christian Science teaches that one of the first duties of its adherents is reliance upon spiritual means alone for healing disease and preserving a healthy body in complete rejection of medicine or other systems of healing such as the osteopathic, chiropractic, naturopathic, psychiatric and the like. For all practical purposes fluoridation of the municipal water supply requires communicants of the Christian Science Church to imbibe directly or indirectly water into which such medicinal additives have been put for the specific purpose of acting upon the persons drinking or otherwise receiving such medicated water into their systems contrary to the religious convictions of the communicants of such church. This would be compulsory state medicine and a dangerous precedent.

The reasons under Rule 42(3) that The Christian Science Board of Directors believes a brief *amicus curiae* in support of appellant's position may be of aid to the Court are (1) that although the record shows careful preservation of the question of freedom of religion from the outset, the Jurisdictional Statement cites no cases relating thereto and the able brief of appellant in the Supreme Court of Ohio cited only *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943) and *Cantwell v. Connecticut*, 310 U. S. 296 (1940); (2) that the application of the clear and present danger test to the invasion of religious liberty here involved should be developed; (3) that the relation between the "establishment of religion" and fluoridation of a municipal water supply by placing medic-

inal additives in it should be explored and (4) that the finality of a legislative determination upon a highly disputed public health program which trenches on the settled religious convictions of large numbers of the citizenry subjected thereto should be carefully weighed in the light of the concurring opinion of the late Mr. Chief Justice Stone in *Skinner v. Oklahoma,* 316 U. S. 535, 543 (1942).

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BRIEF IN SUPPORT OF MOTION TO FILE BRIEF AS AMICUS CURIAE.

INTRODUCTION.

One previous case involving fluoridation of a municipal water supply has come to the Court on appeal. That case was *Chapman v. City of Shreveport,* 348 U. S. 892 (1954). The question of freedom of religion was not presented. This is underscored by the concluding sentence of a note in 15 *La. L. Rev.* 817, 820 dealing with the *Chapman* case:

> "It is interesting to note that the legislation in the instant case was not challenged specifically as an invasion of freedom of religion."

The appeal was dismissed for want of a substantial federal question.

In two other fluoridation cases certiorari has been denied. These are *De Aryan v. Butler,* involving the City of San Diego, California, 347 U. S. 1012 (1954) and *Dowell v. City of Tulsa,* 348 U. S. 912 (1955). In both freedom of religion was only cursorily treated. In the *Dowell* case (273 P. 2d 859) the Oklahoma court said that plaintiff did not elaborate on the allegation raising the religious liberty issue and disposed of the contention in a single sentence along with the charge that fluoridation constituted the unlicensed practice of medicine. In the *De Aryan* case the California court merely said that this Court "has distinguished between the direct compulsions imposed upon individuals, with penalties for violations, and those which are indirect or reasonably incidental to a furnished service or facility." 119 Cal. App. 2d 674, 683; 260 P. 2d 98, 103.

Thus it is plain that no case prior to the case at bar has clearly presented to the Court the questions of con-

flict between the fluoridation of a municipal water supply by placing in it medicinal additives and the freedom of religion safeguarded to individual citizens under the First and Fourteenth Amendments of the Constitution of the United States.

ARGUMENT.

I. There is no clear and present danger supporting any public interest in an invasion of religious liberty.

Reliance upon spiritual means alone for the prevention and cure of disease is a first duty of adherents to the religion of Christian Science. The primacy of this religious teaching in Christian Science cannot be gainsaid as is shown in the following quotations from its denominational textbook, *Science and Health with Key to the Scriptures* by Mary Baker Eddy:

> "First in list of Christian duties, he [Jesus] taught his followers the healing power of Truth and Love. * * *" (Page 31.)

> "* * * God being All-in-all, He made medicine; but that medicine was Mind. It could not have been matter, which departs from the nature and character of Mind, God. * * *" (Page 142.)

> "It is plain that God does not employ drugs or hygiene, nor provide them for human use; else Jesus would have recommended and employed them in his healing. * * *" (Page 143.)

> "* * * Inferior and unspiritual methods of healing may try to make Mind and drugs coalesce, but the two will not mingle scientifically. * * *" (Pages 143-144.)

> "Question.—Does Christian Science, or metaphysical healing, include medication, material hygiene, mesmerism, hypnotism, theosophy, or spiritualism?

"Answer.—Not one of them is included in it. * * *" (Page 484.)

In this same connection in her book entitled *Miscellaneous Writings,* Mrs. Eddy in pointing out that a Christian Scientist should not use medicine quotes the Scriptures that "No man can serve two masters;" and "Every kingdom divided against itself is brought to desolation." (Page 88.)

The binding effect of the injunctions implicit in the foregoing quotations upon individual Christian Scientists is made clear in the following statement from the *Manual of The Mother Church,* also by Mrs. Eddy, which sets forth the by-laws governing the Christian Science denomination:

> "Healing the sick and the sinner with Truth demonstrates what we affirm of Christian Science, and nothing can substitute this demonstration. I recommend that each member of this Church shall strive to demonstrate by his or her practice, that Christian Science heals quickly and wholly, thus proving this Science to be all we claim for it." (Page 92.)

Thus the importance to Christian Scientists of being free from enforced or involuntary medication is indisputable. Equally beyond dispute is the fact that a fluoridated municipal water supply makes consumption of medicated water virtually unavoidable. In contrast, the public good sought to be attained is the prevention of dental caries or tooth decay in children largely between the ages of 6 and 12. The ailment is not contagious. No threat of epidemic is presented. No denial of alternative possibilities recognizing the element of individual choice is made, although such alternatives as topical application of fluorides by a dentist, the use of fluoridated tooth paste, and the individual addition of fluorides to the children's drinking

water at mealtime not only permit the use of fluorides but also the control of dosage, which is not possible when all public water is fluoridated equally but consumed by children and others in widely variant quantities. In this context it is submitted that no clear and present danger to the public is shown which will justify placing a limitation on the right of religious freedom guaranteed by the First Amendment and made applicable to states by the Fourteenth Amendment.

In *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943) a decree of injunction below restraining the enforcement of a regulation requiring participation in salute to the flag and the pledge of allegiance contrary to religious convictions was affirmed. In answering the contention that the proper forum for vindication of plaintiffs' rights was the legislature, Mr. Justice Jackson spoke for the Court as follows:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (Page 638.)

Later Mr. Justice Jackson said:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite

than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.* * * *" (Page 639.) (Emphasis added.)

In *Thomas v. Collins*, 323 U. S. 516 (1945), a Texas conviction of a labor leader from out of state who solicited members in a speech without obtaining an organizer's card was reversed. Mr. Justice Rutledge spoke for the majority as follows:

"*For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.* The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to as-

semble and petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *De Jonge v. Oregon*, 299 U. S. 353, 364, and therefore are united in the First Article's assurance. Cf. 1 Annals of Congress 759-760.

"This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. Cf. *Pierce v. Society of Sisters*, 268 U. S. 510; *Meyer v. Nebraska*, 262 U. S. 390; *Prince v. Massachusetts*, 321 U. S. 158. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." (Pages 530-531.) (Emphasis added.)

II. Fluoridation of a municipal water supply falls within the prohibition of the First Amendment respecting the establishment of religion.

It has been demonstrated under point I above that reliance upon spiritual means alone for the healing and preventing of disease is a basic teaching of Christian Science and practice of Christian Scientists. A corollary is the refusal and rejection of medicine. Fluoridation of a municipal water supply imposes upon communicants of the Church of Christ, Scientist, the practical necessity of consuming directly or indirectly water containing medicinal additives, it being unquestioned that the function of said additives is to operate on the person consuming the water and not as a purifying or cleansing agent on the water itself. Applicant submits that fluoridation therefore amounts to acceptance and recognition by the state of a therapeutic and prophylactic system based upon the administration of medicines or drugs against the wishes and

religious beliefs of the recipient. To this extent fluoridation thus operates as an establishment or official recognition and approval of those religious denominations which find no incompatibility in the use of medicines or drugs and the tenets of their faith and a repudiation or disapproval of Christian Science which rejects the use of such material means. Such an establishment runs counter to repeated statements of this Court.

Zorach v. Clauson, 343 U. S. 306 (1952);
Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203 (1948);
Everson v. Board of Education, 330 U. S. 1 (1947);
Cantwell v. Connecticut, 310 U. S. 296 (1940).

In the *Everson* case the Court said:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. * * *" (Page 15.)

The foregoing was largely quoted with approval in the *McCollum* case. In the *Zorach* decision Mr. Justice Douglas accepted the *McCollum* doctrine and said:

> "* * * Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. * * *" (Page 314.)

The applicant submits that legislation for the fluoridation of a municipal water supply violates the "wall of separation between church and State" by imposing medication upon Christian Scientists contrary to their desires

and religious convictions and by placing the stamp of governmental approval upon forms of religious belief which do not find any conflict with the use and application of medicine or drugs.

III. A Legislative Determination Amounting to Wholesale Invasion of the Personal Liberty of the Communicants of a Religious Denomination Is Subject to Re-examination in the Courts.

Although in *Jacobson v. Massachusetts*, 197 U. S. 11 (1905) involving the constitutionality of a compulsory vaccination statute, the refusal of the trial court to admit evidence to prove "alleged injurious or dangerous effects of vaccination" was upheld, this was justified on the ground that the legislative judgment accorded with common belief of which the court could take judicial notice. Furthermore the statute made an exception as to certain children and this Court indicated a willingness to create a judicial parallel for adults in certain cases. No common belief in the efficacy or safety of fluoridation for the amelioration or prevention of tooth decay in children exists. On the contrary the subject is much disputed. In *Skinner v. Oklahoma*, 316 U. S. 535 (1942) an Oklahoma statute for sterilization of habitual criminals was held to be unconstitutional. The majority placed their decision on a failure to give equal protection under the law. Mr. Chief Justice Stone concurred in result but found a due process question. He stated his position thus:

> "Moreover, if we must presume that the legislature knows—what science has been unable to ascertain—that the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals, I should suppose that we must likewise presume that

> the legislature, in its wisdom, knows that the criminal tendencies of some classes of offenders are more likely to be transmitted than those of others. And so I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process." (Page 544.)

In other words, Mr. Chief Justice Stone expressed the point of view that the finality theretofore accorded a legislative judgment upon the remedy for an ill within its power to treat should not be observed, at least when there is involved a serious invasion of personal liberty. The preferred status of rights under the First Amendment has been observed under point I. In the present context the rule enunciated by Mr. Chief Justice Stone means that the courts should decide whether there was adequate basis for the legislative judgment expressed by the Cleveland City Council in adopting a program to fluoridate the municipal water supply. The evidence in the record contains the transcript of the *Hearings Before the House Select Committee to Investigate the Use of Chemicals in Foods and Cosmetics* of the 82nd Congress (Jurisdictional Statement, p. 13). The committee conducting said hearings became known as the Delaney Committee. After an exhaustive review and extensive expert testimony, the final report of the Delaney Committee concluded that fluoridation of the public drinking water should not be adopted (Jurisdictional Statement, p. 14). Applicant submits that the courts should re-examine the predicate for the legislative decision under the concurring opinion in the *Skinner* case before permitting Christian Scientists in the Cleveland area to suffer the serious invasion of their

rights under the First Amendment which fluoridation will impose.

CONCLUSION.

The Christian Science Board of Directors, as applicant, respectfully requests that the Court grant its motion for leave to file a brief *amicus curiae* herein in support of the Jurisdictional Statement and that the Court note probable jurisdiction. In support applicant cites the concluding remarks of three law review articles dealing with the legal aspects of fluoridation:

> "It is submitted that the actions of these appellate courts are correct; but it is to be regretted that the Supreme Court has denied certiorari in these cases. There is need for a demarcation of the permissible scope of the municipal authorities, acting under the police power, to treat and administer drugs to the entire community, regardless of minority protests." 23 *Geo. Washington L. Rev.* 343, 357 (1955).
>
> "* * * In summation, it can be said that the attacks on fluoridation have been soundly answered by the courts in the police power and miscellaneous area. It is to be hoped that if another case in the fluoridation field arises, the religious freedom issue will be much more fully argued and examined." 1 *Wayne L. Rev.* 141, 144 (1955).
>
> "* * * This is held a valid exercise of the police power because it has reasonable relation to public power. But now, what else can be added to the water supply as beneficial to public health? The implications are vast. Are we opening a new door in public health measures by allowing the use of water supplies as the means for the addition of beneficial substances to the body? Is the next step the addition of vitamins or poliomyelitis vaccine? And then what? Whether they realize it or not, apparently the courts in these decisions have found that the police power of municipali-

ties is broader in scope than was previously realized." 57 *West Virginia L. Rev.* 205, 207 (1955).

Respectfully submitted,

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